(2)

No. 87-593

In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF MAINE,
Petitioner,

vs.

EVENTS INTERNATIONAL, INC., and
JAMES R. NORDMARK,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

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QUESTION PRESENTED

May a state compel by statute, in connection with a charitable solicitation campaign, point-of-solicitation disclosure of estimated percentage figures requiring functionalized accounting and the prospective allocation of dollars among three to five categories, contingent upon whether the solicitor is a professional or volunteer, when all of the above is triggered by a 70% threshold?

LIST OF PARTIES

The parties to the proceedings below were the petitioner State of Maine and the respondents Events International, Inc. and James R. Nordmark. The respondents before this Court include both Events International, Inc. and James R. Nordmark.

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The respondents, Events International, Inc. and James R. Nordmark, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the Maine Supreme Judicial Court in this case.

OPINIONS BELOW

The decision of the Maine Supreme Judicial Court decided July 16, 1987, affirming the judgment of the Superior Court of Kennebec County, Maine, is reported at 528 A.2d 458 and is printed in the Appendix to the Petition for Writ, App. 8.

The opinion of the Superior Court of Kennebec County, Maine, finding 9 M.R.S.A. § 5012 (1980) unconstitutional as violative of the First Amendment has not been reported and is printed in the Appendix to the Petition for Writ, App. 1.

STATUTE INVOLVED

9 M.R.S.A. § 5012 (1980) provides:

It shall be a violation of this chapter for a professional fund raising counsel, professional solicitor, commercial coventurer or any other person to solicit contributions from a prospective donor in this state without fully disclosing to the prospective donor at the time of solicitation the estimated percentage of each dollar contributed, which will be expended for program services, fund raising and management when less than 70% of the amount contributed will be expended for program services. In addition, any person required to register under § 5008, or any of his agents who solicits contributions, shall disclose to the prospective donor at the time of the solicitation the percentage of the gross contribution which will constitute his compensation, and all fund raising expenses connected with that particular contract.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO UNRESOLVED QUESTION

Petitioner, the State of Maine, has suggested that this case presents an important question left open by this Court's decisions in *Village of Schaumburg* and *Munson*, i.e. "whether states could require charitable organizations and professional solicitors to make financial disclosures to potential contributors." (Petition, p. 8) Untrue! This is precisely the means of regulation recommended by the Court in *Schaumburg*:

> Efforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed. 444 U.S. 620 at 637, 638.[1]

Munson adopted by reference the *Schaumburg* approach, i.e. disclosure through registration:

> . . . The point of the *Schaumburg* Court's conclusion that the percentage limitation was not an accurate measure of fraud was that the charity's 'purpose' may include public education. It is no more fraudulent for a charity to pay a professional fund raiser to engage in legitimate public educational activity than it is for the charity to engage in that activity itself. And concerns about unscrupulous professional fund raisers, like concerns about fraudulent charities, can

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1. It is important to note the *Schaumburg* Court was implicitly recommending disclosure-on-request type statutes, not mandatory oral disclosure:

> Illinois law, for example, requires charitable organizations to register with the state attorney general's office and to report certain information about their structure and fund raising activities. Ill. Rev. Stat. Ch. 23, § 5102(a) (1977). *See* n.5, *supra*. 444 U.S. 620, 638, n.12.

Footnote 5 referred to in the above Footnote 12 reads:

> Illinois law requires '(e)very charitable organization . . . which solicits or intends to solicit contributions from persons in th(e) state by any means whatsoever' to file a registration statement with the Illinois attorney general. Ill. Rev. Stat. Ch. 23, § 5102(a) (1977). The registration statement must include a variety of information about the organization and its fund raising activities.
>
> Charitable organizations are required to 'maintain accurate and detailed books and records' which 'shall be open to inspection at all reasonable times by the attorney general or his duly authorized representative.' Section 5102(f). Registration statements filed with the attorney general are also open to public inspection. *Id.* 624, n.5.

> and are accommodated directly, through disclosure and registration requirements and penalties for fraudulent conduct. 467 U.S. 947 at 973, n.16.

Though petitioner may attempt to frame the issue in terms of the disclosure question, it is not the issue properly presented by the case at bar. The finding of overbreadth by the Main Supreme Judicial Court was grounded in its objection to the percentage "triggering device":

> Implicit in the statute's 70% triggering device for these disclosures is an assumption, on the part of the Legislature, that when less than 70% of a charitable contribution is allocated to the 'program services' of a recipient charitable organization, the organization's 'efficiency' and its purported charitable purpose are both suspect, and it should therefore be required to disclose its financial inner-workings to prospective contributors. Based on the Supreme Court's pronouncements concerning similar legislative assumptions and the evidence in this record, we conclude that these premises upon which § 5012 is predicated are untenable and, as a result, the statute, in all of its applications, unnecessarily intrudes upon rights protected by the First Amendment. It is on this basis, discussed in more detail below, that the statute should be struck down as unconstitutional. (Citations omitted). 528 A.2d 458 at 461, Appendix to the Petition for Writ, App. 14.

The true issue presented by this case then, is not the question of disclosure but the question of regulation by use of percentages, which was clearly resolved in *Schaumburg* and *Munson*. If a percentage analysis of a charity's finances is not an accurate measure of fraud, as was un-

equivocally stated in *Munson*,[2] then it necessarily follows that the disclosure of "estimates" of those percentages is going to amount to the disclosure of irrelevant information, which may actually mislead the public and create more harm than good, not only for the charity but also for the prospective donor whose protection is ostensibly at issue.

As observed by Judge Britt in *National Federation of the Blind v. Riley*, 635 F.Supp. 256 (E.D.N.C. 1986), *aff'd*, 817 F.2d 102 (4th Cir. 1987) (*per curiam*), *prob. juris. noted*, 56 U.S.L.W. 3283 (U.S. October 19th, 1987) (No. 87-328), in addressing a similar North Carolina statute:

> For example, where the cost of the product or event being sold consumes 90% of the gross receipts, and the profits are split evenly between the charitable organization and the professional solicitator, section 8 requires a disclosure that the charitable organization is receiving only 5% of the gross receipts. Such a disclosure will put some charitable organizations into a hole from which they will not be able to recover. 635 F.Supp. 256 at 261.

II.

THERE IS NO CONFLICT OF DECISIONS SUFFICIENT TO WARRANT THIS COURT'S ATTENTION

This case finds it true origin in *Village of Schaumburg* and *Munson*. Since these decisions, the entire concept of

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2. The flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud. 467 U.S. 947 at 967.

percentage analysis as a means of regulating charitable solicitations has been rejected: *National Federation of the Blind v. Riley, supra, Shannon v. Telco Communications, Inc.*, 824 F.2d 150 (1st Cir. 1987); *North Dakota v. WRG Enterprises, Inc.*, 314 N.W.2d 842 (N.D. 1982).

The State of Maine would refer the Court to *Heritage Publishing Company v. Fishman*, 634 F.Supp. 1489 (D. Minn. 1986) in support of its argument favoring percentage disclosure. A close reading of *Heritage*, a district court opinion, will reveal it to be not a decision on the merits, but a memorandum opinion relative to the issuance of a preliminary injunction. *Heritage* was later settled out of court and dismissed, and can hardly be reviewed as persuasive authority. Moreover, the court in *Heritage*, based upon *Schaumburg-Munson* analysis, found unconstitutional provisions of a Minnesota statute placing *percentage* limitations on a professional solicitor's fee.

There is no conflict of decisions on the issues *properly* presented by this case sufficient to warrant this Court's attention.

III.

THE QUESTION PRESENTED BY THIS CASE IS NOT IMPORTANT

The true issue presented by this case, percentage regulation of charitable solicitation, is not only well settled but the vehicle of the Maine litigation from which it rises presents so much factual evidence of the statute's patent invalidity that there is no possible saving construction, and therefore there is not an important question meriting this Court's attention.

On its face, the statute obviously requires the disclosure of at least three and as many as five separate percentage calculations. In reviewing the evidence propounded at trial, Judge Brody notes in his "Decision and Order":

> Here, the state imposes a very restrictive impediment on the exercise of free speech. The three-part disclosure requirement is in and of itself restrictive and calculation of the percentage figures imposes an insurmountable burden on many charitable organizations. Appendix to the Petition for Writ, App. 4.

Moreover, Judge Brody found, based upon the evidence, that the percentages themselves, once disclosed, are more likely to mislead than inform the potential donor:

> Testimony at trial supported the defendants' contention that an accurate calculation of the various percentage figures is extremely difficult in many situations and subject to a number of different methods and theories of calculation. As a result, an organization that makes a good faith attempt to comply with § 5012 could arrive at different percentage figures depending upon the accounting method utilized. The imprecision of the disclosure requirement renders it difficult to discern who is required to comply, when they are required to comply, and whether the law is being complied with correctly. Despite this difficulty presented by the statute, § 5012 carries with it a penalty for failure to disclose the percentages as well as for failure to disclose them correctly. After review of the evidence presented at trial, it appears clear that under all but the most ideal cir-

> cumstances, the required percentages are determined by estimates rather than solid figures. The testimony of defendants' expert witnesses fully supports the claim that in the absence of more precise guidelines, the allocation of expenses required by § 5012 is too complex and uncertain to rise beyond the level of a subjective and somewhat speculative determination. Appendix to the Petition for Writ, App. 4-5.

Based upon the record evidence, it is clear this case does not present an important question for this Court's consideration.

IV.

THE DECISION BELOW WAS CORRECT

As noted above, the issue presented by this case is not whether disclosure is a valid concept; that issue is well settled. The issue presented by this case is whether a state may constitutionally compel myriad *percentage* disclosures, once a threshold *percentage* of solicitation and management costs has been met. The Court must ask what presumption motivates the requirement of a 70% triggering device. The answer, as discerned by the Maine Supreme Judicial Court is:

> That when less than 70% of a charitable contribution is allocated to the 'program services' of a recipient charitable organization, the organization's 'efficiency' and its purported charitable purpose are both suspect, and it should therefore be required to disclose its financial inner-workings to prospective contributors. Appendix to the Petition for Writ, App. 14.

In light of the decisions in *Schaumburg, Munson, National Federation of the Blind, Shannon v. Telco Com-*

munications, and *North Dakota v. WRG, supra,* there is no question but that the opinion below is correct: percentages are not an accurate measure of fraud, nor apparently, the efficiency of a fund raising organization. As noted by the Maine Supreme Judicial Court in its opinion below:

> Evidence presented at trial reveals that many charities operate below the 70% threshold during the early years when they are engaged in building a substantial donor base. Their financial allocations to 'program services' may be low simply because they are just getting operations underway and attempting to fulfill a need that is unmet by other organizations. Charities or non-profit groups may also expend more on fund raising or management costs relative to program services because they serve unpopular causes. In either case, it cannot be said that the organization is either fraudulent or less 'efficient' in meeting charitable purposes than others with relatively low fund raising or management costs, and consequently higher percentage allocations to program services. Appendix to the Petition for Writ, App. 15.

The Court went on to say at footnote 7 to its opinion:

> The same may be said for organizations that sponsor very costly fund raising events where the percentage of gross contributions that they obtain for their 'program services' appear small, but in absolute terms the amount is quite substantial. Appendix to the Petition for Writ, App. 15, n.7.

Based upon the legal precedents guiding the Maine Supreme Judicial Court, and the record evidence before it, it is plain that the decision below was correct.

CONCLUSION

For the reasons set forth above, the State of Maine's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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November 11, 1987

CERTIFICATE OF SERVICE

I, Errol Copilevitz, a member of the Bar of the United States Supreme Court representing the Respondents in the above-captioned matter do hereby certify that three copies of the foregoing Response to Petition for Writ of Certiorari to the Maine Supreme Judicial Court have been served upon counsel of record for Petitioner by placing three copies of the same in the United States mail at Kansas City, Missouri, with postage pre-paid and addressed as follows:

Stephen L. Wessler
Assistant Attorney General
Chief, Consumer & Antitrust Division
State House Station 6
Augusta, Maine 04333

this 11th day of November, 1987.

ERROL COPILEVITZ
Counsel of Record